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No. 01-

IN THE

Supreme Court of the United States

MICHAEL LORENZO MORRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a criminal defendant's right to conflict free counsel under the Sixth Amendment to the United States Constitution is violated when his trial counsel is unable to adequately and effectively cross-examine two key witnesses against that defendant and is otherwise unable to pursue the most zealous defense possible, because trial counsel had previously represented those same key government witnesses in prior criminal proceedings?

Whether this Court's pending review of the decision of the United States Court of the Appeals for the Fourth Circuit in the case of *Mickens v. Taylor* affects the validity and vitality of the Fourth Circuit's similar adverse decision in this case, and thereby requires remand of the instant case to the Fourth Circuit in light of this Court's review of *Mickens*?

PARTIES TO THE PROCEEDING

Petitioner is Michael Lorenzo Morris, currently a federal prisoner located at the Federal Correctional Institution in Beaver, West Virginia, and who was the defendant in the underlying criminal trial out of which this Petition arises.

Respondent is the United States of America, in whose custody Petitioner currently resides.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceeding	ii
Table Of Contents	iii
Table Of Cited Authorities	v
Table Of Appendices	vii
Opinions Below	1
Statement Of Jurisdiction	1
Constitutional And Statutory Provisions Involved	1
Statement Of The Case	2
A. Proceedings Below	2
B. Statement Of Facts Relevant To And Supporting Granting The Writ	3
Reasons For Granting The Writ	7
I. The Decision Of The Fourth Circuit Below Is In Conflict With This Court's Prior Decisions Regarding The Right To Conflict-free Criminal Defense Counsel Under The Sixth Amendment As Well As In Derogation Of The Fourth Circuit's Own Prior Precedent Interpreting This Court's Decisions On Such An Important Constitutional Issue.	7

Contents

Page

II. This Court's Pending Review Of The Decision Of The Fourth Circuit In *Mickens v. Taylor* Affects The Validity And Vitality Of The Fourth Circuit's Similar Adverse Decision In Petitioner's Case, And Thereby Requires Remand Of Petitioner's Case To The Fourth Circuit In Light Of This Court's Review Of *Mickens*. 24

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333 (1980) 8

Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347 (1974) 19, 20

Hoffman v. Leeke, 903 F.2d 280 (4th Cir. 1990) ... 8, 18, 20

Mickens v. Taylor (Case No.00-9285), 227 F.3d 203 (4th Cir. 2000), 240 F.3d 348 (4th Cir. 2001) ....i, 24, 25

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674 (1984) 8

United States v. Magini, 973 F.2d 261 (4th Cir. 1992) 8

United States v. Ramsey, 661 F.2d 1013 (4th Cir. 1981) 20

Von Moltke v Gillies, 332 U.S. 708 (1948) 7

Wood v. Georgia, 450 U.S. 268 (1981) 7

Statutes:

21 U.S.C. § 841(a)(1) 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2255 .....1, 2, 3, 8, 23

Cited Authorities

Page

United States Constitution:

Sixth Amendment ..... i, 1, 7, 19

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion And Judgment Of The United States Court Of Appeals For The Fourth Circuit Dated, Decided And Filed August 30, 2001 ..... 1a

Appendix B — Memorandum Opinion And Final Order Of The United States District Court For The Western District Of Virginia, Roanoke Division Dated And Filed February 28, 2001 ..... 4a

Appendix C — Per Curiam Opinion Of The United States Court Of Appeals For The Fourth Circuit Dated And Decided October 22, 1998 ..... 23a

Appendix D — Judgment Of The United States District Court For The Western District Of Virginia Dated And Entered January 30, 1998 ..... 32a

Appendix E — Memorandum Opinion Of The United States District Court For The Western District Of Virginia Charlottesville Division Dated And Filed January 13, 1997 ..... 42a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fourth Circuit opinion (App. A) is unpublished. The district court opinion (App. B) is also unpublished.

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on August 30, 2001. (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution.

The Sixth Amendment states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

This case also involves 28 U.S.C. § 2255, which states, in pertinent part, that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

A. *Proceedings Below*

On October 5, 1994, the Petitioner was indicted in the United States District Court for the Western District of Virginia, Charlottesville Division, in connection with a single count indictment alleging conspiracy to possess with intent to distribute, and to distribute, cocaine, and conspiracy to manufacture, possess with intent to distribute, and distribute, cocaine base (crack), in violation of Title 21 U.S.C. § 841(a)(1).

On October 19, 1995, after a two-day jury trial, Petitioner was found guilty, whereupon his pretrial release was revoked and Petitioner was confined pending sentencing.

On January 23, 1998, Petitioner was sentenced by the Honorable James H. Michael ,Jr., to confinement for a period of 360 months (30 years) with other attendant terms and conditions. (App. D).

Petitioner subsequently filed a direct appeal with the United States Court of Appeals for the Fourth Circuit. By unpublished opinion dated October 22, 1998, the Fourth Circuit affirmed the district court's judgment and sentence. (App. C).

Petitioner then filed a Motion To Vacate, Set Aside, Or Correct Sentence, pursuant to 28 U.S.C. § 2255, in the United States District Court for the Western District of Virginia, Roanoke Division. By Memorandum Opinion And Final Order entered on February 28, 2001, The Honorable James C. Turk granted summary judgment in favor of the United States, and denied Petitioner's 2255 Motion without an evidentiary hearing or oral argument. (App. B).

Petitioner next filed an appeal of the district court's denial of the 2255 Motion, with the Fourth Circuit. By per curiam opinion filed on August 30, 2001, the Fourth Circuit denied a certificate of appealability and dismissed the appeal. (App. A).

Petitioner now respectfully seeks relief from this Honorable Court.

B. ***Statement Of Facts Relevant To And Supporting Granting The Writ***

As the result of an undercover operation in the Esmont/ Chestnut Grove areas near Charlottesville, Virginia, a number of suspected powder and crack cocaine drug dealers in that vicinity were arrested in or around December, 1993 (app. 126)[1] and charged under the state Code. The Appellant, Michael Morris, (hereinafter also referred to as "Morris," or as "defendant" in accordance with his original position in the trial court) however, was *not* one of those persons so charged at that time.

Eventually, many of those arrested agreed to testify as cooperating witnesses against other individuals in the hope of receiving favorable treatment in their state cases or reductions in their state sentences.

Included in that group of arrestees were eight individuals who comprised the evidence against Morris at the federal trial, to-wit: Jerry Rush, Fred Rush, Timothy Rush, Anthony Rush, Alfonzo Larry Rush, Chad Feggans, Fabian Dione Feggans, and Earl Brown.

---

1. The ("app.") references are to the Joint Appendix filed with the Fourth Circuit in connection with Petitioner's earlier direct appeal of his conviction to that Court. (App. A).

Significantly, these eight individuals had close family connections. As Case Agent Andre Jolie testified:

> Q. Are there a lot of families who live down there who are related to each other?
>
> A. Yes. Yes. It tends to be the type of area where families stay in kind of close-knit communities, so everybody is very —everybody knows each other down there.

(app. 111).

Indeed, of these eight testifying cooperating witnesses against the defendant Michael Morris, four apparently were brothers (Jerry Rush, Timothy Rush, Alfonzo Larry Rush). (app. 180, 296-97, 340). Furthermore, Anthony Rush, Jerry and Alfonzo lived within 200 feet of each other and of another brother named Albert, and were the only persons living in that immediate vicinity. (app. 180). As one witness described the configuration, "Three houses. Everyone, it's like they brothers. They got a plot of land. It's like a little circle." (app. 142-43).

A fifth cooperating witness of the eight, one Fred Rush, was a cousin to Jerry Rush (app. 287), and was also related to Anthony Rush as a second cousin. (app. 214).

Two other cooperating witnesses of the eight, Chad Feggans and Fabian Dione Feggans, were cousins to each other (app. 255), and were also related to Anthony Rush as cousins. (app. 169-70).

The last cooperating witness of the eight, one Earl Brown, was a cousin of Chad Feggans as well. (app. 236).

Furthermore, the Rush and Feggans witnesses not only had familial relationships both within their respective family

units as well as between family units, but they in fact enjoyed close actual relationships. Chad Feggans, for example, lived with Jerry Rush for a period of time during the relevant time period in the Chestnut Grove area. (app. 142-43; 174-75). Earl Brown, Chad Feggans' cousin, was also friends with Fred Rush (app. 237), who was related to Alfonzo Larry Rush. (app. 338-39).

Indeed, the Rush family was so close that at least one family member perceived his obligation to cooperate with the authorities as a family unit-based requirement:

> Q. And do you know what the terms of that plea agreement were?
>
> A. They gave me eight years, six months.
>
> Q. And did you have to work with any officers, any investigators, providing information on other drug dealing . . .?
>
> A. *Me and my brothers.*

(app. 286) (emphasis added).

Against this very tight-knit family and friendship backdrop, these eight cooperating witnesses, virtually all of whom were both convicted felons and admitted drug dealers, provided the evidence against Morris, essentially testifying that they observed Morris provide powder and crack cocaine during the relevant time frame, both to themselves or others, in the Esmont/Chestnut Grove area. (app. 140-41; 143; 178; 180-81; 187-88; 209-11; 234; 246; 261-63; 288-89; 334; 336).

Significantly, the evidence which came from this family network of drug dealers against Morris was virtually uncorroborated by any other independent, objective evidence.

For example, Charles Dolan, employed by the law enforcement authorities as an undercover operative, was able to make buys of cocaine from Larry Rush, Jerry, Rush, Fred Rush, Anthony Rush, Chad and Fabian Feggans, and Earl Brown. (app. 321; 324). However, he was unable to say for sure whether he had ever purchased anything from Morris (app. 322). Furthermore, although Dolan's vehicle was outfitted with video and audio equipment by the authorities to enable corroborative evidence to be obtained as to drug dealing, no evidence was ever gathered implicating Morris, and Dolan was simply unsuccessful in making any drug purchases from the defendant. (app. 124-26; 111-12).

Furthermore, contrary to the testimony of many of the Rush and Feggans family witnesses that they had observed the defendant in possession of a weapon or in the process of cooking crack cocaine, undercover operative Charles Dolan testified that he *never* saw Morris with any guns nor *ever* saw Morris cooking cocaine. (app. 326).

Finally, the evidence revealed that the Rush and Feggans family witnesses had a number of opportunities to collaborate with respect to what their testimony against Michael Morris would be. For example, most of the Rush and Feggans family witnesses were together in jail in late December after their initial arrest. (app. 126-27). Likewise, Timothy Rush testified that he was personally present for certain discussions between law enforcement officers and his brother Anthony Rush with regard to Anthony Rush's cooperation. (app. 296-97). Furthermore, Fabian Dione Feggans testified that while he was out on bond from his December, 1993 arrest, he spoke with his cousins Chad Feggans and Anthony Rush about their cooperation as well. (app. 256-57).

During the trial of the case, a conflict of interest developed between Morris' trial counsel and key government

witness Anthony Rush. (app. 275). Furthermore, additional testimony by trial counsel at a post-trial evidentiary hearing disclosed a second conflict of interest which existed between trial counsel and government witness Fabian Dione Feggans at trial. (app. 556-58). These conflicts of a constitutional magnitude are discussed below.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FOURTH CIRCUIT BELOW IS IN CONFLICT WITH THIS COURT'S PRIOR DECISIONS REGARDING THE RIGHT TO CONFLICT-FREE CRIMINAL DEFENSE COUNSEL UNDER THE SIXTH AMENDMENT AS WELL AS IN DEROGATION OF THE FOURTH CIRCUIT'S OWN PRIOR PRECEDENT INTERPRETING THIS COURT'S DECISIONS ON SUCH AN IMPORTANT CONSTITUTIONAL ISSUE.

The right to conflict-free representation is a fundamental right guaranteed to a criminal defendant by the Sixth Amendment:

> Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.

Wood v. Georgia, 450 U.S. 268, 271, 101 S. Ct. 1097, 1103 (1981). *Accord Von Moltke v Gillies*, 332 U.S. 708, 725, 68 S. Ct. 316, 324 (1948) ("The right to counsel guaranteed by the Constitution contemplates the services of an attorney *devoted solely to the interests of his client*.") (emphasis added).

The Fourth Circuit, interpreting this Court's precedents, has described the analytical framework as follows:

> At a minimum, the Sixth Amendment right to effective assistance of counsel encompasses the attorney's duty of loyalty to the client and, concomitantly, the duty to avoid conflicts of interest. . . . A defendant asserting a conflict of interest claim must establish that an actual conflict of interest existed and that it adversely affected counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980). The defendant need not demonstrate prejudice if the conflict of interest actually affected the adequacy of the legal representation. *Id.* at 349, 100 S. Ct. at 1719.

United States v. Magini, 973 F.2d 261, 263 (4th Cir. 1992). *Accord Hoffman v. Leeke*, 903 F.2d 280, 285-86 (4th Cir. 1990), (where "'[an] actual conflict of interest adversely affected his lawyer's performance,' constitutional error has occurred, as prejudice is inherent in the conflict,") *citing with approval Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984), *citing Cuyler v. Sullivan*, 446 U.S. at 350, 100 S. Ct. at 1719.

As demonstrated below, Morris' trial counsel developed a significant and serious conflict of interest in the midst of a jury trial. Under the circumstances, Morris respectfully submits that he has met the standards for demonstrable, presumed prejudice based on an actual conflict of interest, and is entitled to 2255 relief.

A.

During the first day of the jury trial, on October 18, 1995, the government called as a witness one Anthony Levy Rush. (app. 259-284).

Government witness Rush provided certain direct testimony against Morris, which, if believed by the jury, would include evidence of Morris's alleged distribution of crack cocaine, as well as evidence of his alleged possession of an automatic weapon. In addition, witness Rush testified to being a distributor of cocaine himself, which supply he claimed to obtain from Morris.

Upon cross-examination, trial counsel inquired into the inducements offered by the government to witness Rush in exchange for witness Rush's cooperation and testimony.

Central to Morris's case was the theory that the cooperating and immunized government witnesses, admitted criminals themselves, had found an easy scapegoat, in Morris, against whom the witnesses could conveniently fabricate false accusations of drug distribution and other misconduct as part of the cooperating witness' self-interested efforts to obtain government favoritism in their own cases. Otherwise stated, it was critical to the defense theory to be able to demonstrate both the falsity of the accusations against Morris, as well as the *modus operandi*, of the government witnesses in skillfully utilizing "the system" to promote their own interests at the expense of the innocent defendant.

In this respect, it would be both highly probative as to the defense theory, and potentially very damaging to the government's case and witness' credibility, to demonstrate that a government witness such as Mr. Rush had in fact learned the "tricks of the trade" of "rolling over against another person" through earlier experiences in the legal

system. Indeed, demonstrating a pattern or practice on the part of a particular witness in utilizing this kind of self-interested tactic could be quite important in driving a wedge into a government case built solely upon the testimony of immunized and convicted drug dealers and felons.

To this end, trial counsel quite properly embarked upon an inquiry designed to demonstrate this precise precept. As indicated below, however, this essential task on behalf of this particular defendant in confronting and cross-examining government witness Rush was completely eviscerated due to trial counsel's conflict of interest which developed during the trial:

DEFENSE COUNSEL:

> Okay. Now, when you made the decision to testify and to cooperate with the authorities shortly after your arrest, you had done that before, hadn't you, testifying and giving — and making?
>
> A. *Yeah. You was my lawyer.*
>
> Q. On one of the cases?
>
> A. Yeah.
>
> Q. But even before I was your lawyer —
>
> A. No, I hadn't.
>
> Q. *— there was a case where you were — some drug case that you had had back in 1988 that was dismissed. Do you remember that?*
>
> A. *That was you.*
>
> Q. No.
>
> A. *That was you. That's the only other drug charge I had was you.*

Q. I represented you on an assault and battery charge. But anyway, okay, I'll move on. Let me do this —

THE COURT: I think you'd better.

BY MR. SNOOK:

Q. Yes. . . .

(app. 275-276) (emphasis added).

The foregoing passage from the trial record clearly demonstrates the following:

(1) Trial counsel commenced to confront and cross-examine witness Rush along the important defense theory lines discussed above, regarding witness Rush's street-wise ability to manipulate the system to protect himself at the expense of innocent defendants;

(2) Trial counsel evidently intended to elicit the fact that on an earlier occasion, prior to the plea agreement struck between Rush and the government in the case at bar, witness Rush had been in similar criminal drug difficulty, had successfully bailed himself out of trouble with a cooperative agreement implicating others, and had thereby learned how to use this method to his advantage, including in the case at bar against Morris;

(3) Were trial counsel able to fully develop this evidence through witness Rush, then he would have been armed with a very powerful line of argument with the jury not only as to witness Rush, but arguing that this is the same mode of operation that all of the government's "criminal" witnesses, *all* of whom were family and friends of Rush, were utilizing in the case at bar, and citing witness Rush as the "tip of the iceberg" or "the smoking gun" as to the true motives and conduct of all of the family network of government witnesses;

(4) When trial counsel was confronted with the testimony by witness Rush that, in fact, on the earlier occasion, trial counsel himself had actually been witness Rush's attorney in negotiating and procuring the favorable disposition of the earlier drug case, trial counsel was unable to pursue that line of cross-examination any further, and was unable to develop this important evidence on behalf of Morris;

(5) Trial counsel's inability to pursue this line of cross-examination and to develop this important argument for Morris was the direct result of trial counsel's actual conflict of interest which developed during the trial, in that if trial counsel were to pursue this line of argument to its logical conclusion, trial counsel would in effect have impugned his own defense's integrity and credibility by pointing out that he had advised this witness to do the very thing which trial counsel was now condemning as a tactic lacking credibility and infected with self-interest, in his effort to defend Morris;

(6) In addition, trial counsel would be *unable* to cross-examine Rush as fully as possible, because trial counsel could not risk disclosing secrets and confidences arising out of his earlier representation of Rush. *See* Va. Code of Professional Responsibility, Canon 4;

(7) Thus, trial counsel was confronted with the irreconcilable conflict of interest of either pursuing this line of questioning to its ultimate conclusion, while disclosing himself as the protagonist of the allegedly corrupt practice on the part of the witness Rush in the past (and by implication the government family network of cooperating witnesses), while also potentially breaching Rush's secrets and confidences; or abandoning this important line of inquiry to avoid such an awkward scenario, but depriving his present client Morris of important evidence in this case.

The existence of trial counsel's conflict of interest between his trial representation of Morris and his prior representation of key government witness Anthony Rush, however, becomes *conclusively established* by trial counsel's candid sworn testimony at a post-trial evidentiary hearing held before the district court on December 23, 1996. (app. 536-560).

Trial counsel testified at this post-trial hearing that prior to the commencement of defendant Morris' October 18, 1995 trial, he knew government witness Anthony Rush, from prior representation of Anthony Rush. (app. 537-38).

Indeed, trial counsel's testimony at the post-trial evidentiary hearing reflects that trial counsel had garnered intimate details directly bearing upon Rush's credibility, as a result of trial counsel's prior representation of Rush; but which details trial counsel failed to explore on behalf of Morris due to this conflict.

More specifically, trial counsel testified at the evidentiary hearing that on May 23, 1989, he appeared in the Charlottesville General District Court as counsel to Anthony Rush in connection with a misdemeanor assault and battery charge arising out of an attack that Rush had perpetrated against one Tyler, which "busted his jaw," and "caused 5,800, $6,000 worth of medical bills." (app. 538-40). Based upon trial counsel's knowledge of the circumstances of the assault, the extent of the medical bills, and Rush's prior criminal background, trial counsel's "expectation was he was going to do some jail time." (app. 540).

However, when trial counsel arrived in General District Court, the prosecutor approached trial counsel on his own, and offered a 12-month *suspended* sentence (involving no jail time), which was accepted by the defendant Rush. In

discussing the circumstances surrounding this unsolicited favorable offer, trial counsel testified as follows with respect to the prosecutor's position at that time:

> I suspect I went up to him to talk about the case and he seemed to know something. My recollection is he seemed to know about the case, seemed to already have an offer in mind. He, on his own, sort of offered to me, here's 12-month [sic] suspended. *He made some comment, the essence of which, in my mind, was because Anthony has been working with the authorities in other cases, we want to help him out.*

(app. 541) (emphasis added).

Furthermore, trial counsel testified that prior to the prosecutor making the proposal to him and Mr. Rush in court, Mr. Rush "seemed to think it was going to be — his words were, 'I think this case is going to go away.' " (app. 541). Indeed, trial counsel testified to the following significant observation about Mr. Rush's apparent contact and work with the authorities at that time in 1989:

> It seemed pretty clear Mr. Rush had talked with police officers or Steve Deaton [prosecutor] himself, I wasn't sure, but it had been all arranged earlier without my involvement, that the case was going to get taken care of in that way.

(app. 542) (bracketed language added).

In addition, according to records of the Charlottesville, Virginia Circuit Court received into evidence at the evidentiary hearing, Anthony Rush had also been previously charged with a drug offense on November 2, 1988. (app. 546). Furthermore, the records from the Charlottesville Circuit

Court indicated that, in fact, trial counsel was also counsel of record to Mr. Rush in that drug charge (app. 547), in addition to the assault charge discussed above. However, during the trial of Morris, when Mr. Rush advised trial counsel in the presence of the jury that trial counsel had previously represented Mr. Rush on this drug charge, trial counsel incorrectly stated in front of the jury that that was not the case. (app. 546; 275-76).

Furthermore, and most significantly, this state court drug charge was disposed of on May 11, 1989, by way of a nolle prosequi, or dismissal of the charge. (app. 546-47). Also, significantly, this nolle prosequi by the state prosecutor was just twelve days prior to the May 23, 1989 favorable assault charge disposition previously discussed above and upon which trial the same counsel also represented Anthony Rush. (app. 547).

Thus, in the span of twelve days, Anthony Rush, in 1989, had received extremely favorable treatment from the state prosecutor's office on both a felony drug charge and a serious misdemeanor assault charge, during both of which times trial counsel had represented Mr. Rush, and which information would have been highly significant to develop in a detailed fashion before the Morris jury as substantial prior evidence of Rush's (and his testifying family associates') *modus operandi* to utilize the legal system to make favorable deals for himself in exchange for cooperation. Such information could well have caused the jury to reject Mr. Rush's testimony entirely in the Morris trial, and could also have affected and infected the testimony of Rush's family and friends who also testified under similar type deals against Morris. Indeed, at this post-trial evidentiary hearing, under cross examination by the government, trial counsel admitted that "in representing Mr. Anthony Rush back in 1989 . . . ," trial

counsel did "learn from Mr. Rush he was cooperating with law enforcement officials in making drug cases." (app. 550).

Trial counsel further testified at the post-trial evidentiary hearing that some time later after these 1989 events, he recalled observing in the local media information regarding a police narcotics operation dubbed Operation Roasted Chestnut, and observing a number of arrests in connection with that Operation in the December, 1993 time frame. (app. 540).

Trial counsel noted that many of the arrests that were made as part of that Operation were made against persons who ultimately became witnesses for the government against Michael Morris, including government witnesses Anthony Rush and Fabian Dione Feggans who both testified against Morris and who were two individuals whom trial counsel had previously represented. (app. 542).

Significantly, after being advised through media information about Operation Roasted Chestnut that a former client, Anthony Rush, had been arrested, trial counsel happened to see Rush on the street near the state courts some time thereafter. Trial counsel testified as to the following exchange with Anthony Rush at that time:

> I talked to him and I said to him something about I am surprised to see you're on the street and I don't remember the exact words. *The essence of it all, however, was that he'd made a deal and that's why he was back out again.*
>
> . . . .
>
> Actually, at the time, I was just surprised to see him back on the street. I really wasn't meaning to convey anything other than that. I knew that there

> was a fairly serious charge and under state count would carry 5 to 40 years and again, given my general sense of the seriousness of the offense and seriousness of the investigation, I guess I would have figured he probably would have been still in jail.

(app. 543-44) (emphasis added).

Also significantly, trial counsel testified as follows at the evidentiary hearing when questioned further about this subsequent exchange with Rush in 1993:

> Q. When he allowed to you he, in fact, was out because he had made a deal, was that consistent with the way you had known him to operate when you represented him on the assault charge several years back?
>
> A. Generally, yes.

(app. 544)

Unfortunately, however, in this regard, it is highly pertinent to this conflict of interest issue that trial counsel admitted to the following deficiency in his trial representation, during the evidentiary hearing:

> Q. . . . In cross examining Mr. Rush about his history of cooperating with the authorities, would you agree that proving that he had gotten benefit from cooperation, not only in the assault case but in the drug case, would be something of relevance to the jury in weighing his credibility?
>
> A. Yes.

(app. 559).

Unfortunately, trial counsel did not elicit such information from Mr. Rush, inasmuch as trial counsel denied having represented Mr. Rush in connection with such drug charge before the jury, and inasmuch as counsel was either unable or unwilling to delve into the details of that allegation sufficiently during trial to correct his misstatement and afford the defendant adequate and effective assistance of counsel in connection with such important impeachment.

In *Hoffman, supra*, 903 F.2d at 286, the Fourth Circuit, in reversing a denial of a writ of habeas corpus where there was an actual conflict of interest, restated the analytical framework as follows:

> Thus, at the outset we must determine whether there was an *actual conflict of interest* and, if so, *whether that conflict adversely affected* Long's[trial counsel's] representation of Hoffman [defendant client].

(bracketed language added).

Morris respectfully submits that the total record in the case at bar now clearly demonstrates that "there was an actual conflict of interest." Trial counsel apparently had represented witness Rush both in a prior drug case and a prior assault case, and in such a manner that trial counsel was torn between his earlier duties to Rush, and his present duties to Morris.

Furthermore, this "conflict adversely affected [trial counsel's] representation of .. . [defendant Morris]." *Id.*

It is clear from the record that trial counsel was unable to pursue the full and thorough cross-examination of Rush on a key area pertaining to Rush's credibility, and particularly his *bias* as it affected his credibility as a witness. Trial counsel's pursuit of this important point was artificially

truncated by his conflict of interest. When trial counsel himself acknowledged that "I'll move on," even the district court concurred that "I think you'd better." (app. 275).

In prematurely terminating his cross-examination of Rush due to the sudden development of this apparent conflict, trial counsel's representation of Morris was clearly adversely affected. Not only did the disclosures by Rush impeach trial counsel's own theory of the defense by making trial counsel, and thus Morris, appear hypocritical before the jury; but, more importantly, trial counsel was constrained to forfeit Morris's right to confront and cross-examine adverse witnesses as secured by the Sixth Amendment Confrontation Clause:

> The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." . . . "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination."

Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974).

Particularly important to the case at bar is *Davis, supra's* recognition that defense counsel's exposure of an adverse witness' *bias* is of constitutional magnitude in a criminal case:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight

> of his testimony." . . . *We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. . . .*

Davis, supra, 415 U.S. at 316-17 (emphasis added).

Thus, when Morris' trial counsel was compelled to withdraw from the vigorous assault upon Rush's bias due to trial counsel's apparent conflict, trial counsel also thereby was forced to give up a valuable constitutional right of Morris.

Thus, trial counsel's performance and representation were indeed "adversely affected" by his conflict, *Hoffman*, *supra*, 903 F.2d at 286; and since "an actual conflict of interest is present, constitutional error has occurred, as prejudice is inherent in the conflict . . ." *United States v. Ramsey*, 661 F.2d 1013, 1018 (4th Cir. 1981).

Lest there be any lingering scintilla of doubt about the actual prejudice inflicted upon defendant Morris by his trial counsel's conflict, the government's own cross-examination of trial counsel at the December 23, 1996 post-trial evidentiary hearing established such actual prejudice:

> Q. *In your cross examination, was there anything that you felt hampered you?*
>
> A. When Anthony and I got into this colloquy about whether I had represented him or not, I should say that certainly during the time I was representing Michael Morris I had checked my files and the only thing I had in my files referred to the assault and battery charge. I do not know what happened to the file that

pertains to that cocaine charge. *I am certain during the time I was representing Michael that I was not aware that I had represented him on the cocaine charge and I believed that I hadn't. When I got into this where his recollection was obviously better than mine, it was obvious that he and I — to make a long story short, Judge, I sort of got flummoxed at that point. I wasn't quite sure how to proceed.*

Q. *Prior to that point though in the testimony, had you cross examined him about his cooperation with the Government?*

A. *I was just beginning to get to the issue of cooperation.* I guess I talked about it a little bit early on in the cross examination talking about his decision to talk about Michael Morris in particular. Then at 212 is where I was starting to talk about his history of testifying as a snitch and so on.

(app. 552-53) (emphasis added).

Furthermore, when Rush told trial counsel during trial in front of the jury that trial counsel had previously represented Rush, trial counsel was placed in yet another untenable position by this conflict:

Q. When you were — when Mr. Rush told you that you had represented him in this drug case and you said that you hadn't, at that point, were you in a position to challenge him with any information about his history of being a snitch that you had learned from your relationship with him?

A. I wasn't really in a position to challenge him, no.

Q. *In order to challenge him, would you have had to have used independent evidence from your own relationship with him to avoid an ethical dilemma?*

A. *Or to be able to — ethics notwithstanding, to be able to accomplish the job at all, yes, because I can't testify at that point.*

Q. *If you had realized before trial in going through your files that, in fact, you had also been counsel to Mr. Rush in this drug charge in the Circuit Court that was nolle prossed, would you have felt an obligation to disclose that before trial?*

A. *Yes.*

Q. *Would you have disclosed it so that if any question of conflict of interest were raised it could be addressed pre-trial?*

A. *Yes.* As Judge Michael knows, we have the problem all the time with people —

(app. 554-55) (emphasis added).

Thus, trial counsel was caught totally flat-footed on a critical conflict of interest allegation before the jury, and was unable to even pursue the line of examination of the witness without utilizing protected information obtained from the witness as part of the attorney-client relationship. Even the district court at one point in its January 13, 1997 opinion seems to acknowledge the actual prejudice at bar when it wrote that, "Examination of the exchange between trial

counsel and Mr. Rush reveals that trial counsel may have modified his cross examination of Mr. Rush based on previous representation of Mr. Rush, . . ." (app. 575-76).

For the foregoing reasons, Morris respectfully submits that he is entitled to 2255 relief on the ground that his trial counsel possessed a conflict of interest, as described above, which prejudiced Morris' constitutional right to conflict-free counsel.

B.

During the post-trial evidentiary hearing in connection with trial counsel's conflict of interest as to his prior representation of government witness Anthony Rush, it was also disclosed that trial counsel had yet a second conflict of interest as to yet another government witness, to-wit Fabian Dione Feggans. (app. 556-68).

Based on the record developed as to this conflict, the defendant respectfully submits that he is entitled to a new trial as well on the ground that his trial counsel possessed this second conflict of interest.

C.

The defendant respectfully submits that each of the foregoing conflicts of interest, standing alone and independent of each other, provide a separate basis upon which 2255 relief is mandated.

However, even if, *arguendo*, this Court finds that, for whatever reason, such is not the case, defendant respectfully submits that surely the cumulative and combined effect of these conflicts as to two critical government witnesses requires 2255 relief in the form of a new trial.

II.

THIS COURT'S PENDING REVIEW OF THE DECISION OF THE FOURTH CIRCUIT IN *MICKENS v. TAYLOR* AFFECTS THE VALIDITY AND VITALITY OF THE FOURTH CIRCUIT'S SIMILAR ADVERSE DECISION IN PETITIONER'S CASE, AND THEREBY REQUIRES REMAND OF PETITIONER'S CASE TO THE FOURTH CIRCUIT IN LIGHT OF THIS COURT'S REVIEW OF *MICKENS*.

On November 5, 2001, this Court heard oral argument in the case of *Mickens v. Taylor* (Case No. 00-9285). The *Mickens* case involves review of a factually similar conflict-of-interest case, also from the Fourth Circuit, implicating similar constitutional and legal issues as in Petitioner's case.

The *Mickens* review will resolve a critical and sharp conflict between the original decision by a panel of the Fourth Circuit in the *Mickens* case published at 227 F.3d 203 (4th Cir. 2000) and reversing *Mickens'* convictions on conflict-of-interest grounds similar to Petitioner's case, and a subsequent decision *en banc* by the Fourth Circuit vacating the panel's decision and affirming the *Mickens* convictions published at 240 F.3d 348 (4th Cir. 2001).

Petitioner respectfully submits that the original *Mickens* decision decided in 2000 is the correct decision, and controls Petitioner's case. Thus, if this Court's review of *Mickens v. Taylor* results in a decision by this Court which affects Petitioner's case such that the Fourth Circuit's decision below denying a certificate of appealability to Petitioner is in error, then Petitioner would be entitled to remand to the Fourth Circuit for further proceedings in light of this Court's review of *Mickens*.

For the foregoing reasons, therefore, Petitioner respectfully submits that this Court's pending review of *Mickens v. Taylor* affects the validity and vitality of the Fourth Circuit's similar adverse decision in Petitioner's case, and thereby requires remand of Petitioner's case to the Fourth Circuit in light of this Court's review of *Mickens*.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED, DECIDED AND FILED AUGUST 30, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-6718

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL LORENZO MORRIS,

Defendant-Appellant.

Submitted Aug. 23, 2001
Decided Aug. 30, 2001

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.
James C. Turk, District Judge.
(CR-94-46, CA-99-772-7).

* * *

Before WILKINS and KING, Circuit JJ, and HAMILTON, Senior Circuit J.

Appendix A

PER CURIAM.

Michael Lorenzo Morris seeks to appeal the district court's order denying his motion filed under 28 U.S.C.A. § 2255 (West Supp. 2000). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. *United States v. Morris*, Nos. CR-94-46; CA-99-772-7 (W.D. Va. Feb. 28, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED.

Appendix A

JUDGMENT

FILED: August 30, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-6718
CR-94-46
CA-99-772-7

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

MICHAEL LORENZO MORRIS

Defendant – Appellant

Appeal from the United States District Court for the Western District of Virginia at Roanoke

In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

/s/ Patricia S. Connor
Clerk

APPENDIX B — MEMORANDUM OPINION AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION DATED AND FILED FEBRUARY 28, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 7:99-cv-00772
Crim. No. 94-cr-00046

MICHAEL LORENZO MORRIS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION

By: Hon. James C. Turk
United States District Judge

Petitioner, a federal inmate acting through counsel, brings this action as a motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. §2255. He challenges the validity of his 1995 conviction for conspiracy to distribute cocaine and cocaine base. In his motion, he asserts that he was denied his Sixth Amendment right to effective assistance

of counsel because his defense attorney had an actual conflict of interest involving two government witnesses. The respondent has filed a motion for summary judgment. Upon review of the record, the court denies petitioner's motion.

I.

On October 5, 1994, a grand jury returned an indictment charging Michael Morris with a single count of participating in a conspiracy to distribute cocaine and cocaine base (crack) in Albemarle County from December 1991 to December 1993. Morris pled not guilty. After a two-day trial, on October 19, 1995, a jury found him guilty. He was confined, pending sentencing. On October 26, 1995, trial counsel filed a timely motion for new trial. The court ordered on May 16, 1996, that Morris' present counsel be substituted for his trial counsel. On December 11, 1996, the court granted Morris until December 16, 1996 to file any additional, post-trial motions. Counsel filed a supplemental motion for new trial, requesting an evidentiary hearing as to trial counsel's alleged, actual conflict of interest. The court conducted an evidentiary hearing on December 23, 1996. By memorandum opinion and order dated January 13, 1997, the court denied all pending post-trial motions. As to Morris' claims of counsel's actual conflict of interest, the court specifically found that these claims were untimely because they had been filed more than seven days after the conviction. *See* Rule 33, Federal Rules of Criminal Procedure. The court did, however, comment on the claims, finding no ineffectiveness. On January 13, 1997, the court sentenced Morris to 360 months imprisonment. Morris appealed his conviction and sentence. The United States Court of Appeals for the Fourth Circuit affirmed the

judgment of the district court in all respects by unpublished opinion decided on October 22, 1998.

In his §2255 motion, Morris raises three claims:

(1) Petitioner was denied effective assistance of counsel at trial, based upon trial counsel's conflict of interest created by his representation of petitioner at trial and his prior representation of key government witness Anthony Rush in an earlier narcotics case.

(2) Petitioner was denied effective assistance of counsel at trial, based upon trial counsel's conflict of interest created by his representation of petitioner at trial and his prior representation of key government witness Fabian Dione Feggans in an earlier criminal case.

(3) Even if, *arguendo*, each of the Rush and Feggans conflicts possessed by trial counsel are not sufficient, standing alone, to deprive petitioner of effective assistance of counsel, their cumulative, combined effect deprived petitioner of effective assistance of counsel at trial.

II.

After an undercover drug investigation in the Esmont/ Chestnut Grove areas near Charlottesville, Virginia, in late 1993, law enforcement officials arrested several individuals suspected of dealing in powder and crack cocaine and charged them with state drug offenses. Morris was not among these suspects. Many of the suspects agreed to cooperate with officials and to testify against other suspected drug dealers

in hopes of receiving favorable consideration in sentencing on the state drug charges. Officials wanted to identify the individuals bringing the drugs into the area. Eight of these early arrestees provided the bulk of the testimony against Morris at his federal drug trial: Jerry Rush, Fred Rush, Timothy Rush, Alfonzo Larry Rush, Anthony Rush, Chad Feggans, Fabian Dione Feggans, and Earl Brown. The evidence showed that these witnesses had close family[1] or neighborhood ties.

At trial, these witnesses testified about their drug dealings with Morris from 1991 to 1993: that they had purchased cocaine from him or sold cocaine for him or both, that they had seen him cook cocaine powder into crack, that they had seen him with a gun in his car as he was engaged in drug dealing, that on weekends he would bring large amounts of cocaine down to Albemarle County from his home in Norfolk to sell himself or to front to others. On direct examination, some of these witnesses testified about their agreements with authorities to provide information and testimony about other drug dealers in exchange for consideration on their state sentences. Others were already serving state sentences and did not have plea agreements including any sentence reduction for cooperation.

Morris' trial attorney, J. Lloyd Snook, III, in cross examination of these witnesses, emphasized their inability to remember specific dates or times as to any of their alleged drug dealing or observations of Morris. Snook also questioned the witnesses about their cooperation with

1. Timothy Rush testified that he and his brothers worked with officers to provide information on other drug dealers.

authorities. Then, Anthony Rush took the stand. Anthony testified that he had pled guilty to 1993 state drug charges pursuant to a plea agreement in which he agreed to provide information to investigators. He testified that he had purchased cocaine in half-ounce quantities from Morris many times, that Morris sometimes had a gun with him when they did these drug deals, usually in Morris' rental car, and that he had seen Morris trade guns for crack. Anthony testified that sometimes Morris accepted partial payment from Anthony for cocaine and Anthony would complete the payment after he sold the drugs.

On cross-examination, Snook asked Anthony about his state court plea agreement:

Snook: And do you know what sort of sentence you would have gotten if you hadn't made a deal?

Rush: I did, but I forgot.

Snook: All right. Is it fair to say that it would have been somewhere in the neighborhood of seven years?

Rush: Yeah.

Snook: Okay. So you wound up serving no time at all; is that right?

Rush: Yeah.

Snook: And the reason you spent no time at all was that you were cooperating with the Government?

Rush: Yes.

Anthony Rush testified that shortly after he was arrested in 1993, he provided information to agents about other people selling cocaine, but did not offer information about Morris until agents asked him about Morris. Snook questioned him closely about this fact on cross. Then, Snook asked Anthony about previous plea agreements he had entered in other past state convictions in which Anthony had agreed to testify or provide information against others:

Snook: Okay. Now, when you made the decision to testify and to cooperate with the authorities shortly after your arrest, you had done that before, hadn't you, testifying and giving — and making?

Rush: Yeah. You was my lawyer.

Snook: On one of the cases?

Rush: Yeah.

Snook: But even before I was your lawyer —

Rush: No, I hadn't.

Snook: — there was a case where you were — some drug case that you had had back in 1988 that was dismissed. Do you remember that?

Rush: That was you. That's the only other drug charge I had was you.

Snook: I represented you on an assault and battery charge. But anyway, okay, I'll move on.

Let me do this —

The Court: I think you'd better.

After this exchange, Snook moved on to question Anthony about his history as a drug dealer, about his lack of steady employment other than selling drugs, about his preparation with the Assistant United States Attorney for his trial testimony, about his inability to remember any dates or times of his alleged transactions with Morris. After Anthony Rush, several more of the witnesses listed above took the stand. At the end of the two day trial, on October 19, 1995, the jury found Morris guilty. Snook filed the motion for new trial and objections to the presentence report.

More than seven months after the trial, the court granted Morris' requests to substitute counsel and continue his sentencing date. His new attorney, Andrew Michael Sacks, indicated that he would seek to add new claims to the motion for new trial. The court finally held a hearing on the motion

for new trial on December 16, 1996, more than a year after the trial. Sacks argued two claims at the hearing, neither of which appeared in the original, timely motion for new trial: that the court should have held a Rule 44(c) hearing regarding the conflict of interest revealed when Anthony Rush testified that Snook had represented him in a prior drug case and that Snook could not provide effective assistance of counsel for Morris because conflicts of interest based on his prior representation of Rush and Feggans, two of the government's witnesses against Morris. Snook testified that he did not remember representing Anthony Rush in his 1988 state drug charge. Sacks produced evidence indicating, indeed, that Snook did represent Rush on that charge in the Circuit Court for the City of Charlottesville and that the charge was nol prossed on the motion of the Commonwealth Attorney without objection from Snook on May 11, 1989. Snook testified that even after seeing Sacks' documentation, he did not remember representing Rush on the drug charge. He further testified that if he had remembered, he would have reported it to the court and to Morris.

Morris argues that Snook's trial strategy was to suggest that Anthony Rush, as an experienced deal maker on prior criminal charges, became the ringleader in a conspiracy for all of the Rush-Feggans group to offer cooperation with the government and frame Morris as the big drug dealer in town. Snook testified to several pieces of information that he knew at the time of trial that would have been useful in cross-examining Anthony Rush to further this strategy. Snook recalled representing Rush on a misdemeanor assault and battery charge in Charlottesville in April-May 1989. Because Rush had broken a man's jaw and caused several thousand

dollars in medical bills, Snook expected that Rush would do some jail time for the offense. However, on the day of the trial, the prosecutor offered an unsolicited plea agreement in which Rush would receive a twelve-month suspended sentence and no jail time. Snook testified that the prosecutor "made some comment, the essence of which, in my mind, was because Anthony has been working with the authorities in other cases, we want to help him out." Snook also testified that Rush had told him early in the case that "I think this case is going to go away" and that Rush had told him that "he was cooperating with law enforcement officials in making drug cases."[2] Snook also testified that he recognized Anthony Rush's name in a newspaper article list of people arrested in December 1993 in Esmont. Shortly after that, Snook met Rush on the street and asked him how he was out of jail so soon on such a serious drug charge. Rush told him that he'd made a deal.

The court also heard evidence about Snook's alleged conflict of interest stemming from his prior representation of Fabian Dione Feggans, another government witness against Morris. Snook had previously represented Feggans in a matter before the Juvenile Court regarding a violation of a juvenile probation requirement that occurred after Feggans became an adult. Snook testified that Feggans' probation matter had nothing to do with Morris, although he admitted that he did not have record of whether it was drug-related. Snook testified that if he had thought anything related to his previous representation of Feggans was relevant

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2. The evidence showed that Rush's drug charge had been noll prossed just twelve days before the favorable disposition on the assault and battery case.

to Morris' defense, he would have disclosed the prior representation to the court.

As stated, the court denied Morris' motion for new trial based on conflict of interest claims as untimely, and the Fourth Circuit affirmed that decision on appeal. Neither court based its ruling on the merits of the conflict of interest claims. Upon review of the applicable law and the facts developed during the December 1996 hearing on the motion for new trial, the court finds that Morris' claims are without merit.

III.

Claim 1

An attorney's conflicting interests can provide basis for a claim of ineffective assistance where petitioner establishes the existence of specific circumstances. Petitioner must show (1) that his lawyer actively pursued conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance on his behalf. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). As prejudice to the case is presumed under these circumstances, petitioner need not demonstrate any likelihood that, without counsel's conflicts, the jury's conclusion would have been different. *Id. Compare Strickland v. Washington*, 466 U.S. 668, 685 (1984) (to show counsel provided ineffective assistance, petitioner must show specific actions by counsel were both incompetent and prejudicial — were so egregious as to create reasonable probability that but for counsel's error, outcome would have been different).

Appendix B

Counsel's previous representation of co-defendants or government witnesses is not a *per se* Sixth Amendment violation; petitioner must allege facts meeting the *Cuyler* "actual conflict" standard. *Cuyler, supra.* The United States Court of Appeals for the Fourth Circuit has defined the factors of the *Cuyler* standard in more detail as follows:

> The two requirements, an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap. An attorney has an actual conflict when he actively represents conflicting interests. [*Cuyler*], 446 U.S. at 350, 100 S. Ct. at 1719. His representation of conflicting interests, however, is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client. When the attorney is actively engaged in legal representation which requires him to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one. The effect of his action of necessity will adversely affect the appropriate defense of the other. Moreover, an adverse effect may not always be revealed from a review of the affirmative actions taken. Rather, the failure to take actions that are clearly suggested from the circumstances can be as revealing. Thus the failure

> of defense counsel to cross-examine a prosecution witness whose testimony is material or the failure to resist the presentation of arguably inadmissible evidence can be considered to be actual lapses in the defense.

United States v. Tatum, 943 F.2d 370, 375-76 (4th Cir. 1991). Put another way, to establish a claim under *Cuyler*, petitioner "must show [1] that [counsel's competing] interests 'diverg[d] with respect to a material factual or legal issue or to a course of action,' " and (2) that counsel took an action adverse to the defense of petitioner or failed to take action on behalf petitioner specifically to serve his other interest. *Williams v. French*, 146 F.3d 203, 212 (4th Cir. 1998) (citations omitted).

Morris argues that when Rush testified, unexpectedly, that Snook had represented him on the drug charge, Snook instantly developed a conflict of interest between maintaining confidential information about Rush that he learned during his representation of Rush and pursuing a strong line of cross-examination in support of Morris' defense. Morris argues that Snook chose not to question Rush about Rush's previous deal-making because Snook's own apparent participation in that very deal-making impugned his argument on behalf of Morris that Rush's deal-making made him an incredible and self-interested witness unworthy of the jury's confidence.

The court cannot find any actual conflict here. First, Morris does not specifically argue, and the court does not find, that any actual conflicting interest could have existed while Snook did not remember his representation of Rush

on the drug charge. Snook could not have been protecting Rush's interest as a former client on a related charge when he did not know the relationship had existed. Even after Rush reminded Snook of his representation in the previous drug case, Snook had no interest in protecting Rush that conflicted with his duty to represent Morris. Snook himself testified at the hearing on the motion for new trial that "any deficiencies in [his] cross examination [of Rush] were not caused by pangs of [conscience] about violating an attorney/client privilege." Indeed, as he learned of Rush's deal making through a conversation with the prosecutor, Snook could have questioned Rush further about the deal making without violating attorney/client privilege.

Furthermore, even assuming that Snook felt some duty to protect Rush, the court cannot find that any effort to protect Rush caused Snook to stop his line of questioning. Snook himself said that he was merely "caught off guard by the obvious disparity between [Rush's] recollection and [his]." Snook testified that he "sort of got derailed there, but it really wasn't an ethical dilemma that [he] felt." The court finds no reason to disbelieve Snook's explanation. Moreover, the court cannot identify any ethical dilemma that might have caused Snook's change of course. Morris himself argues that Snook could not effectively question Rush further about his previous deal-making because to do so would impugn the very defense he was arguing for Morris, that deal-making demonstrated a person's self-interest and untrustworthiness as a witness. If Snook stopped his line of questioning for this reason, it was his duty to represent Morris, not his conflicting duty to protect Rush, that caused his action. Thus, Snook's decision to stop the questioning cannot support a *Cuyler* claim.

Appendix B

If Snook had investigated Rush's background sufficiently to discover his prior representation of rush, he would have reported the conflict and would likely have refused to take Morris' case; then, another attorney might have been able to question Rush more closely and to argue that Rush used his deal-making experience to help friends and family frame Morris as the biggest drug dealer in Esmont. However, the court finds no indication that Snook limited his investigation of Rush's history in preparing for Morris' case out of any conflicting duty to protect Rush's interests. Thus, that omission cannot support a claim under the *Cuyler* analysis.

At most, Snook's failure to discover his prior representation might give rise to an ineffective assistance claim under *Strickland* alleging counsel's careless failure to investigate the witness' background. Morris raises no such claim in his §2255 motion. In any event, the court finds that Morris fails to present facts supporting a claim of ineffective assistance. To prove that his counsel's assistance was so defective as to require reversal of his conviction or sentence, a convicted defendant must show not only counsel's incompetence, but also resulting prejudice. *Strickland, supra.* Specifically, he must demonstrate "a reasonable probability" that but for counsel's unprofessional error, the result reached by a reasonable and impartial fact finder would have been different. *Id.* at 694-95. The court finds that Morris has not met this standard. In the first place, Snook did elicit Rush's admission that he had previously made deals in criminal cases and demonstrated that many of the witnesses against Morris were related to one another and that many of them offered cooperation in exchange for leniency. This testimony alone would have been sufficient to support an argument that Rush

might have encouraged his family and friends to testify as a unit against Morris in order to seek sentence reductions for assisting authorities. In the second place, none of the questions Snook failed to ask Rush would have resulted in evidence contradicting the testimony of other witnesses about their knowledge of Morris' drug dealing. Accordingly, the court finds no reasonable probability that further questioning of Rush about his prior deals with law enforcement would have affected the outcome of Morris' trial. *Id.* Based on the foregoing, the court denies relief as to Claim 1.

Claim 2

The court also finds no ground for relief as to Claim 2, alleging Snook's actual conflict of interest based on his prior representation of Feggans. The trial transcript of Feggans' testimony on cross-examination does not reveal any evidence that Snook suffered under any conflict of interest. Feggans testified on direct that he had pled guilty to state drug charges carrying substantial sentences. Snook elicited Feggans' testimony that because of Feggans' cooperation with authorities while he was out on bond, Feggans' bond was not revoked despite the defendant's violation of bond conditions. Feggans admitted that while he was out on bond, he and his cousins, Anthony Rush and Chad Feggans talked about the fact that they were cooperating with authorities. Snook also elicited testimony that Feggans' sentencing on the state charges was originally scheduled for September 1994, but did not occur until February 1995, months after Feggans testified against Morris before the grand jury. Finally, Snook elicited Feggans' admission that the Commonwealth's Attorney had asked the state court to sentence Feggans below

the midpoint of the range recommended by the sentencing guidelines because of his cooperation with authorities. Petitioner does not point to any respect in which questioning about Feggans' juvenile record would have been relevant, beneficial, or even admissible in Morris' case. *See* Rule 609(d), Federal Rules of Evidence. Based on the foregoing, the court cannot find that Morris has demonstrated an actual conflict or any manner in which a possible conflict adversely affected Snook's representation. *Cuyler*, *supra*. The court denies relief on Claim 2 accordingly.

In Claim 3, Morris asserts that even if the alleged conflicts with Rush and Feggans fail to present constitutional claims of ineffective assistance under *Cuyler*, the cumulative effect of the two conflicts deprived Morris of effective assistance. This claim falls under the *Cuyler* test itself, as the court has found no actual conflict of interest Snook had with either Rush or Feggans. Moreover, an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation." *See Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1290 (1999) (citations omitted). The court denies relief as to Claim 3.

In conclusion, the court finds upon the record that petitioner is not entitled to relief under §2255 and thus finds no need for an evidentiary hearing. The court denies the §2255 motion in its entirety. An appropriate order shall be issued this day.

The petitioner is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate

Appendix B

Procedure by filing a notice of appeal with this court within sixty (60) days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to petitioner and to counsel of record for the respondent.

ENTER: This 28th day of February, 2001.

s/ James C. Turk
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 7:99-cv-00772
Crim. No. 94-cr-00046

MICHAEL LORENZO MORRIS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION

By: Hon. James C. Turk
United States District Judge

In accordance with the accompanying memorandum opinion, it is hereby

ADJUDGED AND ORDERED

that respondent's motion shall be and is hereby **GRANTED**; that petitioner's motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. §2255, and his request for evidentiary hearing shall be and hereby are **DENIED**; and this action is hereby stricken from the active docket of the court.

Appendix B

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to petitioner and to counsel of record for the respondent.

ENTER: This 28th day of February, 2001.

s/ James C. Turk
United States District Judge

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED OCTOBER 22, 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-4091

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL LORENZO MORRIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
James H. Michael, Jr., Senior District Judge.
(CR-94-46)

Submitted: September 22, 1998

Decided: October 22, 1998

Before MURNAGHAN, NIEMEYER, and WILLIAMS,
Circuit Judges.

* * *

Appendix C

OPINION

PER CURIAM:

Michael Morris appeals from the district court order entered pursuant to jury verdict finding him guilty of conspiracy to distribute cocaine and cocaine base in violation of 21 U.S.C. §§ 841(b)(1)(A), 846 (1994). Finding no merit to his claims, we affirm his conviction and sentence.

At Morris' trial, the government called numerous unindicted coconspirators to testify about Morris' distribution activities. Anthony Rush described how Morris occasionally sold him half-ounce quantities of crack cocaine. On cross-examination, Morris' attorney, J. Lloyd Snook, attempted to impeach Rush by asking him about his cooperation with authorities in past criminal investigations. In the course of his examination Rush indicated that Snook had represented him on two prior criminal charges. After a brief interchange in which Snook and Rush disagreed about whether Snook had represented Rush on a prior drug charge, Snook abandoned the line of questioning. Following Morris' conviction in October 1995, he filed a motion for a new trial. In December 1996 Morris, having obtained new counsel, filed a supplemental motion for a new trial alleging that trial counsel was ineffective due to a conflict of interest. Following a hearing, the district court denied Morris' motions for a new trial.

Morris first claims that trial counsel's performance was compromised by a conflict of interest stemming from his former representation of Rush and another government

witness. He further asserts that counsel was ineffective for failing to request a jury instruction addressing his failure to testify. "The rule in this circuit is that a claim of ineffective assistance should be raised in a 28 U.S.C. § 2255 motion in the district court rather than on direct appeal, unless the record conclusively shows ineffective assistance." *United States v. Williams*, 977 F.2d 866, 871 (4th Cir. 1992). "The Sixth Amendment is implicated only when the representation of counsel is adversely affected by an *actual* conflict of interest." *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991). To succeed in establishing ineffective assistance of counsel based on an actual conflict of interest, a claimant must prove that counsel took action on behalf of one client and that the action adversely affected the defense of the other. *See id.* at 376. An attorney's performance has been adversely affected when the attorney actively pursued conflicting interests. *See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). The inquiries into whether an actual conflict of interest existed and whether it adversely affected the representation "are fact-based inquiries that often will be intertwined." *United States v. Swartz*, 975 F.2d 1042, 1048 (4th Cir. 1992).

On this record we do not find that Snook's former representation of two government witnesses conclusively shows a conflict of interest or that any potential conflict adversely affected Snook's representation of Morris. Accordingly, Morris is foreclosed from raising in this appeal his claims of ineffective assistance based on an alleged conflict of interest. *See Williams*, 977 F.2d at 871. Similarly, considering the strict standard for establishing claims of ineffective assistance and the overwhelming evidence against Morris presented at trial, Morris has not conclusively shown

that Snook was ineffective for failing to request a jury instruction with respect to Morris' failure to testify. Thus, Morris is relegated to raising his ineffective assistance claims in a § 2255 motion.

Morris next asserts that the district court erred in not conducting an evidentiary hearing during trial to determine whether trial counsel's performance was compromised by a conflict of interest. To protect the interest in conflict-free representation, Federal Rule of Criminal Procedure 44(c) requires the district court to "promptly inquire with respect to such joint representation and [ ] personally advise each defendant of the right to the effective assistance of counsel, including separate representation." Fed. R. Crim. P. 44(c). Although the plain language of Rule 44(c) speaks to conflicts arising from joint representation, Morris asserts that the district court had an obligation to sua sponte conduct a Rule 44(c) hearing because Snook's former representation of Rush signaled a conflict of interest. However, Rule 44(c) is confined to conflicts arising from joint representation, *see Cerro v. United States*, 872 F.2d 780, 786-87 (7th Cir. 1989); *see also United States v. Pungitore*, 910 F.2d 1084, 1140-41 (3d Cir. 1990) (refusing to expand application of Rule 44(c) beyond its plain meaning), and Morris offers no authority for his position that the district court erred in not conducting a conflict of interest hearing based on Snook's former representation of a witness. Accordingly, we find no merit to his claim that the district court erred in not holding a Rule 44(c) hearing.

Morris assigns error to the district court's decision that it was without jurisdiction to consider the additional grounds

for a new trial put forth in his supplemental motion for a new trial. Federal Rule of Criminal Procedure 33 provides that a motion for a new trial based on any ground other than newly discovered evidence must be made within seven days after verdict unless an extension is granted within that seven-day period. Morris' claim that the district court's order extending the time within which he could file post-trial motions enabled him to append additional grounds to his motion for a new trial is unpersuasive. A Rule 33 motion based on ineffective assistance must be filed within seven days after the verdict. *See United States v. Smith*, 62 F.3d 641, 651 (4th Cir. 1995). Because Morris raised his ineffective assistance claims more than seven days after the jury returned a guilty verdict and failed to obtain an extension within that seven-day period, the district court correctly found that it lacked jurisdiction to hear the claims. *See id.* at 648.

Morris further alleges that the district court erred in not instructing the jury that his failure to testify could not be considered in reaching a verdict. Because this issue was not raised at trial, this court's review is for plain error only. *See United States v. Olano*, 507 U.S. 725, 731 (1993). Plain error requires an error that is clear or obvious, that affects substantial rights, *i.e.*, is prejudicial to the defendant, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.* at 732. Here, the district court instructed the jury that the law did not require Morris to testify and that the jury could draw no inference from his election not to testify. In light of this instruction, any failure to give a more elaborate instruction on Morris' decision not to testify did not amount to plain error.

Morris next asserts that the district court erred in striking two prospective jurors for cause. A district court's determination to excuse a juror for cause is entitled to "special deference." *Patton v. Yount*, 467 U.S. 1025, 1038 (1984). Morris maintains that the district court should have inquired further of the potential jurors to find out whether they could set aside their personal views and experiences and render an impartial verdict on the evidence. District courts are given wide discretion in conducting voir dire to determine whether a particular juror should be excused. *See Person v. Miller*, 854 F.2d 656, 665 (4th Cir. 1988). Here, prospective juror Thomas McIntosh disclosed to the court that he would have a problem accepting as true the testimony of witnesses testifying in exchange for reduced sentences. Although this is a legitimate factor to consider in assessing a witness' credibility, the district court's decision to strike McIntosh on this basis was not an abuse of discretion. Further, the district court had ample reason to strike prospective juror Ruby Smith based on her admission that her knowledge of a witness' past might affect her ability to be impartial.

Morris also maintains that the district court erred in allowing Special Agent Andre Jolie to testify as an expert on drug conspiracies. He asserts that Jolie's testimony amounted to improper speculation about the drug conspiracy at issue in the case, or in the alternative, irrelevant descriptions of drug conspiracies in general. The district court's determination to admit expert testimony is reviewed for abuse of discretion. *See Kopf v. Skyrm*, 993 F.2d 374, 378 (4th Cir. 1993). Morris' discontent with the substance of Agent Jolie's testimony ignores the plain language of Rule 702 which allows for an expert to testify as to his specialized knowledge

in a given area if the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Expert testimony about drug organizations and common practices of drug dealers is routinely admitted in drug cases in order to assist the jury in understanding the mechanics of drug conspiracies. *See, e.g., United States v. Gastiaburo*, 16 F.3d 582, 588-89 (4th Cir. 1994). Accordingly, the district court acted within its discretion in admitting Agent Jolie's expert testimony.

Finally, Morris claims that the district court erred in the calculation of his base offense level for sentencing purposes. He first assigns error to the district court's decision to attribute to him more than 500 grams of cocaine. Morris contends that this amount is a speculative figure derived from the uncorroborated testimony of cooperating government witnesses. The government has the burden of proving by a preponderance of the evidence sentencing factors, including the quantity of drugs for which a defendant should be held accountable. *See United States v. Estrada*, 42 F.3d 228, 231 (4th Cir. 1994). In proving these factors, the government may rely upon information found in a defendant's presentence report unless the defendant affirmatively shows that such information is inaccurate or unreliable. *See United States v. Gilliam*, 987 F.2d 1009, 1014 (4th Cir. 1993). In cases like this where no drugs are seized, the sentencing court may approximate the quantity to be used for sentencing, and hearsay alone can provide sufficiently reliable evidence of quantity. *See United States v. Uwaeme*, 975 F.2d 1016, 1019 (4th Cir. 1992). This court reviews the district court's findings on sentencing factors for clear error. *United States v. McDonald*, 61 F.3d 248, 255 (4th Cir. 1995).

Appendix C

Morris presented no evidence challenging the presentence report's recommendation to hold him responsible for 510.29 grams of crack cocaine. The evidence adduced at trial supports this figure, and the district court expressly reviewed the trial testimony before adopting the amounts recommended in the presentence report. Therefore, the district court did not clearly err in determining the amount of drugs attributable to Morris.

Morris also challenges the four point adjustment to his base offense level based on his leadership role in the offense. The sentencing guidelines provide for a four-level sentencing enhancement "[i]f the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive." *United States Sentencing Guidelines Manual* § 3B1.1(a) (1994). The Commentary to § 3B1.1(a) states:

> In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1, comment. (n.4). Enhancements for a defendant's leadership role in a conspiracy under § 3B1.1(a) have been applied where the defendant was "a major supplier of both drugs for distribution and re-distribution by other members of the conspiracy." *See United States v. Banks*, 10 F.3d 1044, 1057 (4th Cir. 1993); *see also United States v. Smith*, 914 F.2d 565, 570 (4th Cir. 1990). Review of an enhancement for the defendant's role in the conspiracy is under the clearly erroneous standard. 18 U.S.C. § 3742(e) (1994); *United States v. Arnoldt*, 947 F.2d 1120, 1128 (4th Cir. 1991).

The evidence demonstrated that Morris traveled from Norfolk to the Esmont area for the purpose of selling cocaine. He was a regular supplier of cocaine to other drug dealers within the conspiracy, occasionally fronted cocaine, and induced individuals to make sales for him in exchange for small quantities of cocaine. On appeal, Morris does not dispute that he had at least nine co-conspirators. When viewed as a whole, the evidence suggests that Morris was a major supplier of cocaine to drug dealers in the Esmont area and recruited accomplices to facilitate his cocaine sales. Under these circumstances, we can not say that the district court's four-level enhancement for Morris' leadership role in the conspiracy was clearly erroneous.

We therefore affirm Morris' conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA DATED AND ENTERED JANUARY 30, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

Case Number: 3:94-00046-01

UNITED STATES OF AMERICA

v.

MICHAEL LORENZO MORRIS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

J. Lloyd Snook, Esq.
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) one after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841 (b)(1)(A); 846	Conspiracy to distribute cocaine and cocaine base	12/93	1

Appendix D

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 230-90-3885	23 January 1998 Date of Imposition of Judgment
Defendant's Date of Birth: 06/30/59	
Defendant's USM No.: 26788-083	s/ James H. Michael, Jr. Signature of Judicial Officer
Defendant's Residence Address: 3318 Peronne Avenue Norfolk, VA 23509	James H. Michael, Jr. Senior United States District Judge Name & Title of Judicial Officer
Defendant's Mailing Address: custody	1/30/98 Date

Appendix D

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of Three Hundred and Sixty Months (360)

☒ The court makes the following recommendations to the Bureau of Prisons:

Defendant be incarcerated at FCI Petersburg or in the alternative Morgantown, WVA

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Sixty (60) months.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Appendix D

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

Appendix D

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant shall not commit another federal, state, or local crime.

Defendant shall not illegally possess a controlled substance.

Defendant shall comply with the standard conditions of supervised release.

Appendix D

Defendant shall submit to urinalysis testing as directed by 18 U.S.C. Section 3583(d).

Defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

Defendant shall not possess a firearm or destructive device and shall reside in a residence free of firearms and destructive devices.

Defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer.

Defendant does not have the ability to pay a fine within the guideline range, however, can pay a fine below that range by participating in the Inmate Financial Responsibility Program administered by the Bureau of Prisons. Therefore, the court orders that the defendant pay the United States a fine of $500.00 which shall be due immediately.

Defendant does not have the ability to pay interest. The court will waive the interest requirement in this case.

Appendix D

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine
Totals:	$5 0.00	$500.00

* * *

FINE

* * *

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

* * *

Appendix D

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

Appendix D

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

* * *

Guideline Range Determined by the Court:

Total Offense Level: 42

Criminal History Category: I

Imprisonment Range: 360 to life

Supervised Release Range: 5 years

Fine Range: $ 25,000 to $ 4,000,000

☒ Fine waived or below the guideline range because of inability to pay.

* * *

☒ The sentence is within the guideline range, that range exceeds 24 months, and sentence is imposed for the following reasons: Substantial drug weight.

* * * *

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION DATED AND FILED JANUARY 13, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CRIM. ACTION NO. 94-00046-C

UNITED STATES OF AMERICA,

v.

MICHAEL LORENZO MORRIS,

Defendant.

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

Following a trial on October 18-19, 1995, over which this court presided, a jury convicted Defendant Michael Lorenzo Morris of conspiring to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846. A few days later, defendant's trial counsel moved the court for a new trial. Trial counsel, however, was soon thereafter substituted by current counsel, who requested the court to delay ruling on the motion for a new trial pending supplementation by current counsel; certain arguments in the motion for a new trial depended upon portions of the trial transcript, and therefore,

current counsel asked the court to postpone ruling on the motion until he presented the court with the relevant portions of the transcript. Over a year later, and after much prodding by the court and the clerks of court, defendant's current counsel supplemented trial counsel's motion for a new trial; instead of simply providing portions of the transcript necessary to trial counsel's motion, current counsel advanced new grounds in support of his motion for a new trial. Also, current counsel filed a motion requesting discovery, inspection, and exculpatory evidence. The court held a hearing on the matter on December 23, 1996.

I.

Current counsel bases his motion for a new trial on the following grounds. First, he argues that trial counsel's conflict of interest prevented trial counsel from representing defendant's best interests; apparently, defendant's trial counsel previously represented Anthony Levy Rush, one of the witnesses against defendant, and defendant claims that this prior representation interfered with trial counsel's ability to cross examine Mr. Rush. Second, defendant's current counsel contends that trial counsel's alleged conflict and trial counsel's failure to instruct the jury that it could not consider defendant's failure to testify as a factor in deliberations rise to ineffective assistance of counsel. Neither of the grounds was presented in trial counsel's motion for a new trial.

A.

Rule 33 of the Federal Rules of Criminal Procedure provides as follows:

Appendix E

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.... A motion for a new trial based on any ... ground [but a finding of new evidence] shall be made within 7 days after verdict or ... within such further time as the court may fix during the 7-day period.

The jury in this case returned a verdict of guilty on October 19, 1995. Defendant's trial counsel filed a motion for a new trial on October 26, 1995. This motion was timely. No request for an extension of time to supplement the motion with different grounds was made to the court within the seven day time period. Subsequently, on May 15, 1996, defendant's current counsel filed a motion in which he indicated that he would "supplement" trial counsel's motion for a new trial. The May 15, 1996 motion was styled as a "Motion For Substitution of Counsel and For a Continuance of the Sentencing Date." On May 16, 1996, the court granted the motion; but the court made no reference to current counsel's desire to advance new grounds in support of a motion for a new trial.

Even if the court's May 16, 1996 Order could be interpreted as acquiescing in current counsel's intention to offer arguments not previously made by trial counsel, such a construction of the court's Order cannot be accepted under the governing rules of criminal procedure, specifically Rule 33. Rule 33 is jurisdictional in nature, and, consequently, precludes deviation from its requirements, even by the court. 3 Charles A. Wright, Federal Practice and Procedure, § 558 (2d ed. 1982) ("The time limitations of Rule 33 are

jurisdictional. The court is without power to consider an untimely motion for a new trial. It cannot extend the time in which to move for a new trial except as specifically provided in Rule 33 itself."). That trial counsel filed a timely motion for a new trial in no way operates to toll the time limit or to permit subsequent untimely assertions advancing new and unrelated grounds. *See In re Wright*, 826 F.2d 1061, 1987 WL 44515 (4th Cir. 1987) (per curium) (unpublished) (not cited for precedent, bur for its rationale) (stating that the district court could consider two timely motions for a new trial, but not a third motion that was filed after the seven-day time limit had expired) (citing *United States v. Smith*, 331 U.S. 469 (1947); 3 Charles A. Wright, Federal Practice and Procedure, § 558 (2d ed. 1982)).

Under this precedent, the court cannot consider current counsel's untimely allegation that a conflict of interest infected defendant's trial, thus requiring that defendant be granted a new trial.

B.

Although current counsel neither mentioned trial counsel's motion for a new trial in his briefs to the court nor elaborated upon the motion during oral argument, apparently current counsel has not abandoned the three grounds trial counsel advanced in his motion for a new trial. *See* Transcript of December 23, 1996 Hearing at p. 3. As discussed above, this motion was filed within the seven days permitted by Rule 33 and, therefore, the court will address trial counsel's motion for a new trial on the merits. The following are the three grounds upon which defendant's trial counsel relies in

requesting a new trial: (1) the court erred in striking two jurors for cause; (2) the court erred in permitting Special Agent Andre Jolie from the Federal Bureau of Investigations to testify as an expert in drug conspiracies; and (3) the court erred in refusing to permit Mr. Rush to be questioned about alleged drug use that occurred after the defendant committed the acts with which he was charged.

The third issue is simply a question of evidence: does the probative value of suggesting that Mr. Rush is a current drug user outweigh the prejudicial value of cross examination that was unaccompanied by any hard evidence that Mr. Rush was in fact currently dealing drugs? Defendant argues that such testimony might have shown (1) that Mr. Rush was a bad character; (2) that Mr. Rush was dealing drugs with impunity because he agreed to testify for the government; and (3) that defendant was not essential to the drug conspiracy since Mr. Rush was still able to get drugs even without defendant. Considering the countervailing prejudice that would have accompanied such cross, the court adheres to its earlier ruling. No new trial is warranted because the court refused to permit this line of questioning. This is especially so, given that Mr. Rush did testify as to his past criminal history and his deals with the government pursuant to which he agreed to cooperate with the government in their investigations. Because the jury was aware of these factors, the jury members could well understand the nature of Mr. Rush's character and the context in which Mr. Rush was testifying.

The second issue again concerns an evidentiary matter. Defendant claims the special agent's testimony was

irrelevant, or, alternatively, barred as hearsay. Defendant insists that the real purpose behind the expert's testimony was to provide the government with a coherent witness and to plant in the jury's collective head the idea that because defendant drove a rental car, defendant was a drug dealer. But the testimony was clearly relevant because the special agent apparently testified about the drug organization of which defendant was a part. Rule 703 of the Federal Rules of Evidence disposes of defendant's hearsay argument; Rule 703 permits otherwise unadmissible evidence to be introduced by experts so long as it is of a type reasonably relied upon by experts. Fed. R. Evid. 703. It is reasonable to assume that experts on drug organizations rely on statements made by members of the organizations. Accordingly, even if the expert's testimony was hearsay, it is not inadmissible under the rules of evidence, and the admission of the testimony requires no new trial.

Finally, defendant argues that two jurors should not have been stricken for cause. The court struck one of the jurors because she knew "the history" of one of the government's witnesses (who ultimately did not testify at trial). Defendant claims that the second juror was struck simply because he admitted that he would give less credibility to a witness who was receiving a benefit (i.e., reduced prison time) in return for his testimony even though the law permits the juror to do so. But it is unclear whether this was the reason the court struck the juror, as trial counsel's motion notes that "[trial c]ounsel's recollection of that testimony is different from the [c]ourt's recollection." Mot. for New Trial at p. 1. Trial counsel then promises to obtain a transcript of the relevant testimony, and requests the court to postpone deciding this

matter pending receipt of the transcript. The transcript still has not been proffered to the court, and, accordingly, the court will consider this matter no further. As to defendant's argument that the court was wrong to strike a juror with personal knowledge of a witness, even accepting the reasoning that this was somehow erroneous, there is no basis on which to conclude that exclusion of this juror warrants a new trial under Rule 33. Rule 33 does not provide relief from every conceivable trial error; only when a miscarriage of justice would result without a new trial, should a motion for a new trial be granted. 3 Charles A. Wright, Federal Practice and Procedure, § 551 (2d ed. 1982). Defendant has not made this necessary showing.

C.

Next defendant's current counsel urges that trial counsel's alleged conflict constitutes ineffective assistance of counsel. During oral argument, current counsel characterized trial counsel as "very competent," Transcript of December 23, 1996 Hearing at p. 14, which gives the court some pause regarding the strength of current counsel's claim that trial counsel's performance was so deficient as to violate the Sixth Amendment. Nevertheless, the court will assume that current counsel has not abandoned his ineffective assistance argument. The Fourth Circuit has indicated that "[t]he rule in this circuit is that a claim of ineffective assistance should be raised in a 28 U.S.C. § 2255 [habeas corpus] motion . . . , unless the record conclusively shows ineffective assistance." *United States v. Williams*, 977 F.2d 866, 871 (4th Cir. 1992). Examination of the exchange between trial counsel and Mr. Rush reveals that trial counsel

may have modified his cross examination of Mr. Rush based on previous representation of Mr. Rush; from this observation to the conclusion that the possible effect on cross rose to ineffective assistance of counsel would be a great leap, justified neither by common sense nor factual evidence. It cannot be said that the record conclusively indicates ineffective assistance of counsel based on trial counsel's cross examination of Mr. Rush.

Equally unpersuasive is current counsel's argument that trial counsel's representation was conclusively ineffective because trial counsel did not request the court to instruct the jury that "defendant's failure to testify may not be discussed or considered by the jury in any way when deliberating and in arriving at your verdict." Given defendant's concession that the court did instruct the jury that the defendant was not required "to testify at all" and that the jury could draw "[n]o inference from such election," trial counsel's failure to offer other instructions for the court's consideration does not even begin to sink to the level of ineffective assistance.

Based on the reasons discussed above, the court denies defendant's motions for a new trial. Hence, current counsel's motion for discovery, inspection, and exculpatory evidence is also denied as moot.

An appropriate Order shall this day issue.

ENTERED: s/ James H. Michael, Jr.
1/13/97